

SOUTH AFRICA / JUDGMENT

Korbitec (Pty) Ltd and Another v eThekwinini Municipality and Another (5984.2010)

[2011] ZAKZDHC 90 (18 October 2011)

[2011] ZAKZDHC 90

COURT

Kwazulu-Natal High Court, Durban

BEFORE

Mbatha

CASE / FILE NUMBER

5984/2010

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IN

THE KWAZULU-NATAL HIGH COURT, DURBAN

REPUBLIC

OF SOUTH AFRICA

Case

No. 5984/2010

In

the matter between:

KORBITEC

(PTY)

LTD.....

FIRST APPLICANT

LEGALPERFECT

SOFTWARE SOLUTION

(PTY)

LTD.....SECOND

APPLICANT

and

eTHEKWINI

MUNICIPALITY.....FIRST

RESPONDENT

LAW

ACTIVE (PTY)

LIMITED.....SECOND

RESPONDET

JUDGMENT

Delivered: 18 October 2011

MBATHA J

- [1] This is an application for a review in terms of Rule 53 in which the applicants seeks the review, correction and setting aside of actions by the First Respondent said to be administrative actions capable of review.

THE PARTIES AND THEIR GENERAL BACKGROUND

- [2] The First Applicant is Korbitec (Pty) Limited (“Korbitec”), a duly registered company with limited liability with its principal place of business in Cape Town where it carries on business as a developer and vendor of computer software for the legal market.
- [3] The Second Applicant is Legalperfect Software Solutions (Pty) Limited (“Legalperfect”), a duly registered company with its principal place of business in Johannesburg where it likewise carries on business as a developer and vendor of computer software for the legal market. The Applicants will be referred to as Korbitec and Legalperfect respectively in this judgment.
- [4] The main drive behind this application is Korbitec. Legalperfect aligned itself with the relief being sought by Korbitec and the founding affidavit of its director appears at page 157 to 161 of the papers. It is fair to say that Legalperfect’s involvement in this application is in the nature of a principled stand for any of the relief claimable in the Notice of Motion as it was not directly involved in the history of this piece of litigation.
- [5] The First Respondent is the eThekweni Municipality; a Local Government institution established in terms of the Municipal Structures Act 177 of 1998 and is the municipality for the Durban Metropolitan and adjacent areas (“the municipality”).
- [6] The Second Respondent is Law Active (Pty) Limited (“Law”), a duly registered company with the same business description as Korbitec and Legalperfect with principal place of business in Johannesburg.
- [7] Law initially filed a notice of intention to oppose the relief being sought in this application for review but later withdrew its opposition but nevertheless caused an answering affidavit to be filed on its behalf. An application to strike out this answering affidavit followed and an order was eventually taken by consent to the effect that this affidavit be struck out. I have ignored this affidavit and any reference to its contents in the affidavits filed on behalf of the municipality. It should be mentioned however that it came to the attention of Mr Louis Kruger, the head of revenue of the municipality, who deposed to the answering affidavit on behalf of the municipality, that “the business” which forms the subject matter of this application had been transferred to Law when all along he had been dealing with Law Holdings (Pty) Limited, previously known as Lawyers Access Web (Pty) Ltd, then

represented by one Trevor Coppen as its director. Apparently “the business” had been transferred to Law with effect from 1 January 2008 and Trevor Coppen also happens to be its director. The attitude of the municipality is to deal with Law on the basis that it is a subcontractor of Law Holdings (Pty) Ltd and that it will continue to carry on with the agreement and involvement of Law as if the agreement between Law and Law Holdings (Pty) Ltd had not been concluded. Nothing turns on this development as the relief being sought by the applicants is to challenge and have the business arrangement itself reviewed. For the purpose of this judgment I will ignore this development and refer to Law as the contracting party with the municipality as if though it was the contracting part from the beginning.

THE ORDERS BEING SOUGHT

The Notice of Motion as amended seeks the following relief:

- 1.1 Declaring that an agreement concluded between the First Respondent (“the City”) and the Law (“Law”) in terms of which Law was afforded exclusive electronic access to the City’s rates clearance data via its IRCAM portal be declared to be void alternatively that all decisions by the City to enter into and give effect to such agreement be reviewed and set aside;
- 1.2 Reviewing and setting aside, and correcting, the City’s decision to deny the Applicants (“Korbitec”), and the public electronic access to the City’s rates clearance data via its IRCAM system on terms less favourable than those granted to Law;
- 1.3 Declaring that Korbitec and the public are entitled to electronic access to the City’s rates clearance data via its IRCAM system on terms no less favourable than those granted to Law; and
- 1.4 Mandating the City to do all things necessary to give the Applicants and the public access to its rates clearance data via its IRCAM system on terms no less favourable than granted to Law.

BACKGROUND

TO THIS APPLICATION

[8] For a proper perspective of the issues involved it is expedient to deal with information provided by the municipality in the answering affidavit on its behalf by Mr Louis Kruger. I do this as it seems that when filing the founding affidavit on behalf of Korbitec, it may not have known about the time frames when the alleged agreement between Law and the municipality came into being and the circumstances prevailing at the time.

[9] In order for an immovable property to be transferred to a buyer, a conveyancing attorney requires what is called “a rates

clearance certificate”. Section 118 of the Municipal Systems Act No. 32 of 2000 (“the System Act”) prevents

the registration of transfer of any immovable property except on production to the registrar of deeds of this prescribed certificate

issued by the municipality concerned which certifies that all amounts that became due in connection with that property for municipal

service fees, surcharges on fees, property rates and other municipal taxes and levies have been paid in full. The effect of section 118 of the Systems Act was a broadening of the scope of what was traditionally called “a rates clearance certificate”

giving the municipality the opportunity to recover not only outstanding rates but basically anything outstanding by way of indebtedness to the municipality in connection with the property concerned prior to its transfer to the new owner. I will continue to refer to this certificate as the rates clearance certificate.

[10] In order for the municipality to cope with this demand of checking whether there is any amount outstanding and due to it before issuing a rates clearance certificate it involved a check with many internal systems within the municipality, each of whom may potentially have a debit on its books against that property. To consolidate this task the municipality caused to be designed an internal computerised system called IRCAM prior to the year 2003. The conveyancers were obliged to provide certain specific information when requesting rates clearance certificate and this information (provided manually) was fed into the IRCAM system which then generated a pathway to all sections in the municipality that may have had debits in respect of the property and accumulated the information necessary in order to inform the conveyancer of what had to be paid in order to receive the rates clearance certificate. IRCAM would then produce a document known as “the attorney report” which would inform the attorney of the amount due and how it was made up. Once payment of the required amount had been made a rates clearance certificate would be manually created and collected by the attorney concerned.

[11] Whilst IRCAM was no doubt a useful tool for the processing of rates clearance certificates it still left a lot of work to be done manually and internal interaction by various departments within the municipality with IRCAM. Of importance is the fact the IRCAM was not designed to have an interface with the outside world but a computerised internal mechanism for use by municipal employees.

[12] In 2003 the municipality received an approach from Law to consider the creation of a portal within IRCAM allowing Law access to it so that conveyancers could address the municipality electronically when applying for rates clearance certificates and to do so by means of a program to be devised, installed and paid for by Law. The object was for Law to communicate directly with conveyancers inclined to use its service via the internet and to use the portal thus created to gather all the required information from IRCAM, determine the amount due to the municipality, inform the conveyancing attorney accordingly, and once payment of the rates and other charges had been paid, to produce an electronically devised rates clearance certificate which the conveyancer can then print at his or her end of the computer. For this service Law charges the conveyancing attorney a fee of which 15% payable to it by Law adequate to meet all expenses from the municipality’s side to keep the

system operating. Moreover it relieved the municipality from the burden of the manual component of the internal use of IRCAM.

- [13] Not surprisingly this innovation was a success and by the year 2009 almost all, if not all, rates clearance certificates were issued through the portal means with Law. It is safe to assume that the municipality, Law and the conveyancers using Law's portal into the inner workings of IRCAM were content with this arrangement.
- [14] The tranquillity of the arrangement between the municipality and Law came under threat quite inconspicuously. At some time Korbitec came into being (the date of its incorporation is not stated) and provided a similar service to the one provided by Law to other municipalities and institutions. If it wanted to access a rate clearance certificate on behalf of its clients from the municipality it had no option other than to make use of the services of Law or do so manually. Mr Adriaan Jacobus Basson who deposed to the First Applicant's founding affidavit describes Korbitec as one of the largest legal software developers, vendors and service providers at the leading edge of technology and states that it deals with large banks and financial institutions where data integrity and security is of paramount importance. I have no reason to doubt Korbitec's self-confidence and its ability to at least provide a portal into IRCAM with the same efficiency as Law had done for the better part of 7 years.
- [15] According to Mr Basson, Korbitec became increasingly dissatisfied with Law's service and in the course of 2009 decided to create software to communicate directly with IRCAM. This according to Mr Basson would preclude the need to refer its clients to its principal competitor in Durban, namely, Law, and to promote the latter's business. With this object in mind

representatives of Korbitec met representatives of the municipality in August 2009 to explore the establishment of a direct electronic

link between Korbitec and IRCAM at the expense of Korbitec. According to Mr Basson the meeting went well and this seems to be borne out by the contents of various emails that passed between Korbitec and the municipality during that period.

- [16] In the months that followed the municipality became less enthusiastic about allowing Korbitec a portal into IRCAM judging from the contents of the emails that passed between them. On 2 December 2009 Mr Basson addressed an email to Mr Kruger asking him to explain Law's involvement with Korbitec's proposal and went on to add that Korbitec had resolved to terminate its use of Law as a conduit. On 9 December 2009 Mr Kruger provided a detailed response to Korbitec's proposal and in essence told it that the municipality only wished to deal with Law. According to Mr Basson this placed Korbitec in a serious predicament as the conduit between it and Law had been terminated and it therefore had to submit Korbitec's Durban customers' rates clearance applications manually. It informed the municipality of this decision and received a response from Mr Kruger to the effect that it should reinstate its link with Law. I need to add that there is not even a suggestion that Law

is precluding Korbitec from using its portal into IRCAM.

THE RELIEF CLAIMED

- [17] The Applicants seek to have the contract, association or arrangement between the municipality and the Law reviewed and set aside. To this end they required the record of all the arrangements, decisions and actions pertaining to this decision from the municipality and after a considerable delay were provided with whatever documents the municipality could (or wanted) to provide.
- [18] I have thus far referred to the workings between the municipality and Law in respect of IRCAM as “an arrangement”. This arrangement was never reduced to writing and Mr Kruger calls it an oral agreement that was reached between the municipality and Law sometime during the latter part of 2003. Mr Kruger goes on to say when he concluded the agreement he did so with the authority and under the guidance of Mr Kumar who was the Deputy City Manager at the time. This is confirmed by Mr Kumar on affidavit. The events leading up to the implementation of the portal into IRCAM by Law is recorded in a number of emails and the fact of the implementation of this system and its continued use for a number of years leads one to the inevitable conclusion that an oral agreement came into being between the municipality and Law.
- [19] When Mr Basson deposed to the founding affidavit on behalf of Korbitec the terms of the arrangement between Law and the municipality were not known to it and it was assumed that the municipality has afforded Law exclusive direct access to and use of its electronic rates system amounting to a monopoly in favour of Law that is unconstitutional and in contravention of a plethora of statutory and regulatory prescripts and constitutes unfair and unlawful administrative action. The municipality responded to this allegation by saying that when it concluded the agreement with Law in 2003 it did so in terms of section 114 (2) of the Durban Extended Powers Consolidated Ordinance, No. 18 of 1976 which then regulated its powers to contract with third parties at the time. This section

reads as follows:

“114 TENDERS

(2)

- (a) Notwithstanding the provisions of any law the Council may, without calling for tenders, enter into any contract of any nature

subject to the limitations set forth in paragraph (b).

(b)

- (i) The estimated expenditure under such contract shall not exceed R10 000 in any one calendar month, or such higher amount as the Council may with the consent of the Administrator decide.

(ii) Such contract shall not be one under which expenditure will be incurred for a period of exceeding twelve months.”

[20] It seems that the municipality did not call for tenders when it entered into the arrangement with Law but assumed that since no expenditure would be incurred by it in implementing this arrangement it was entitled to implement the arrangement without having to put the matter out for tender.

[21] In his replying affidavit Mr Basson accepted that the oral agreement between the municipality and Law had been concluded during 2003 but persisted in his attack on the legality of this agreement on the basis that Mr Kruger had no authority to conclude this agreement on behalf of the municipality. He pointed to the absence in the documents provided, of a delegation of authority to Mr Kruger to enter into this agreement. I am not prepared to even consider the alleged absence of authority to enter into the agreement. Firstly, it seems on the face of it that the municipality was entitled to enter into the agreement without the need to call for tenders and, secondly, the agreement has been in force for more than seven (7) years and in these circumstances reliance on such a technicality to set aside the agreement would be manifestly uncalled for even if the required written authority cannot be produced, as such authority can nevertheless in all the circumstances be implied.

[22] The existence of the oral agreement between the municipality and Law since 2003 can hardly be labelled an administrative action capable of being reviewed and set aside. The cases relied upon on behalf of the First Applicant for this proposition, Logbro Properties CC v Bedderson No[1] and others 2003 (2) SA 460 SCA and SA Metal Machinery Co (Pty) Ltd v City of Cape Town[2]

[2000] ZASCA 127; 2001 (1) SA 348 (WCC) goes no further than to identify the competitive process, and the interaction therein by public officials, in the securing of a tender as an administrative action. Even if I am wrong in assuming that the oral agreement does not amount to an administrative action and is capable of review I would not have granted the order seeking to declare the agreement void because the adverse consequences to both the municipality and Law outweighs the necessity to visit any judicial sanction on the failure by the municipality to comply with statutory requirements back in 2003. Support for such an approach can be found in Millenium Waste Management (Pty) Ltd v Chairperson Tender Board Limpopo Province and others[3] 2008 (2) SA 481 (SCA) at par 23 and Moseme Road Construction CC and Others v King Civil Engineering Contractors (Pty) Ltd and Another[4] 2010 (4) SA 359 (SCA) at par 21.

[23] The matter does not end there. It seems that this application was premised on the understanding that by concluding the agreement with Law the municipality has denied the public in general access to information which they previously had. This is quite simply not the case. Although the valuation of property roll is in the public domain, the account of any individual in relation to property is not and these accounts have never been accessible to all

and sundry. Korbitec has no better locus standi than any member of the public to be declared entitled to have access to a port via IRCAM. I agree with the submission made by counsel who appeared on behalf of the First Respondent that what Korbitec is seeking is tantamount to an order compelling the municipality to enter into an agreement with it. This in my view is the untenable result that will follow should any of the orders sought be granted.

[24] Lastly, I should mention that a belated attempt was made in the replying affidavit filed on behalf of Korbitec to the effect that the decision not allow Korbitec direct access to IRCAM during 2009 as evidenced in the emails during that period between it and the municipality amounted to an administrative decision and that all the plethora of legislation referred to then became applicable to such a decision, rendering it reviewable on any number of grounds. In my view this decision was nothing more than a decision not to contract with Korbitec.

[25] It follows that the application must fail and I make the following order

The application is dismissed with costs including the costs consequent on the employment of two counsel. The order as to cost is made against the Applicants' jointly and severally the one paying the other to be absolve.

Date of Hearing: 28 March 2011

Date of Judgment: 18 October 2011

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DURBAN

- [1] 2003
 - (2) SA 460 SCA
 - [2] 2001
 - (1) SA 348 (WCC)
 - [3] 2008
 - (2) SA 481 (SCA)
 - [4] 2010
 - (4) SA 359 (SCA)
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